

FEDERAL COURSEL
OF COPYRIGHT

OCT 23 1998

BEFORE THE
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

RECEIVED

In the Matter of)
)
Digital Phonorecord Delivery)
Rate Adjustment Proceeding)

Docket No. 96-4 CARP DPRA

COMMENTS OF BROADCAST MUSIC, INC.; THE AMERICAN SOCIETY
OF AUTHORS, COMPOSERS, AND PUBLISHERS; AND SESAC, INC.

On behalf of Broadcast Music, Inc. ("BMI"), the American Society of Authors, Composers and Publishers ("ASCAP"), and SESAC, Inc. ("SESAC") (collectively, "Performing Rights Organizations"), we hereby respond to the Copyright Office ("Office") Order of October 16, 1998. In its Order, the Office requests comments on a Memorandum dated October 14, 1998, by the National Music Publishers Association ("NMPA"), the Songwriters Guild of America ("SGA"), and the Recording Industry Association of America ("RIAA") regarding the adoption of rates and regulations for general and incidental digital phonorecord deliveries.

The Performing Rights Organizations generally support the Memorandum of NMPA, SGA and RIAA and do not object to their recommendations, provided that the regulations clarify "that the Section 115 compulsory license does not apply to any rights of public performance that may exist in the digital transmission subject to the compulsory license." See BMI Comments dated December 29, 1997. Earlier in this proceeding, BMI specifically requested that Part 255 of the regulations be amended to state that

nothing therein affects the public performance rights under 17 U.S.C. § 106(4). Id. at 3. Similarly, on July 30 and 31, 1998, respectively, both ASCAP and SESAC filed a Notice of Intent to Participate in this proceeding for the limited purpose of ensuring that any rates and regulations adopted by the Office or a CARP recognize that Section 115 does not apply to any right of public performance in digital transmissions.

As NMPA, SGA and RIAA observe, no party has disputed the requests of the Performing Rights Organizations for clarification in the regulations. It has been suggested, however, that any clarification can be addressed "by preamble to the regulations."

A preamble presumably would appear only one time in the Federal Register announcing the new regulations and not in the Code of Federal Regulations ("C.F.R.") and therefore, would not have any regulatory effect. In contrast, a general statement set forth in the C.F.R. would serve a more meaningful and ongoing purpose to ensure that the regulations do not serve as a trap for the unwary. Such a statement would ensure that users know that public performances are not covered by the regulations. Moreover, regulatory clarity would fulfill the duty of the Register of Copyrights to "establish regulations not inconsistent with law for the administration of the functions and duties made the responsibility of the Register" pursuant to the Copyright Act. 17 U.S.C. § 702. Finally, the amendment offered herein to the proposed regulations tracks statutory language set forth in 17 U.S.C. § 115.

Accordingly, the Performing Rights Organizations request that the Office add a new Section 255.8 to Part 255, C.F.R., to provide as follows: "Nothing in Part 255 annuls or limits the exclusive right to publicly perform a musical work, including by means of a digital transmission, under 17 U.S.C. 106(4), that is subject to Sections 255.5 or 255.6."¹ See Exhibit A.

¹ The Performing Rights Organizations have no objection to a more precise or more expansive tracking of the statutory language in 17 U.S.C. § 115(c)(3)(K) to incorporate reference to the public performance right in sound recordings (see 17 U.S.C. § 106(6)).

Respectfully submitted,

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October 23, 1998

Exhibit A

Section 255.8 is inserted in Part 255, C.F.R., as follows:

§ 255.8 Relationship to Public Performance Right.

Nothing in Part 255 annuls or limits the exclusive right to publicly perform a musical work, including by means of a digital transmission, under 17 U.S.C. 106(4), that is subject to Sections 255.5 or 255.6.

CERTIFICATE OF SERVICE

I, Cynthia A. Queen, hereby certify that on this 23rd day of October, 1998, a copy of the foregoing Comments of Broadcast Music, Inc.; The American Society of Authors, Composers, and Publishers; and SESAC Inc. was served by first class mail, postage prepaid, to the following:

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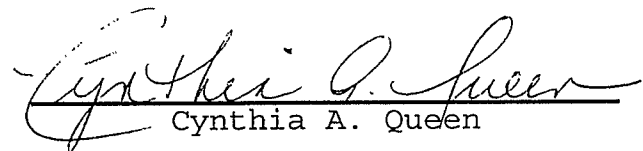
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